IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 633 of 2000

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE
HONOURABLE MR.JUSTICE SHARAD D.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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DAHYABHAI KANABHAI PARMAR - Appellant(s)
Versus
STATE OF GUJARAT & 1 - Opponent(s)

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Appearance :
MR YOGESH S LAKHANI for Appellant(s) : 1 - 3.
MS FALGUNI PATEL, APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

and

HONOURABLE MR.JUSTICE SHARAD D.DAVE

Date : 04/05/2007

ORAL JUDGMENT
(Per : HONOURABLE MR.JUSTICE A.L.DAVE)

The present appeal arises out of a judgment and order rendered by City Sessions Court, Ahmedabad in Sessions Case No.48 of 2000 on 29th June, 2000. The appellants were tried by the City Sessions Court for offences punishable under Section 294(b) read with Section 114, Section 326 read with Section 114 and Section 302 read with Section 114 of I.P.C. and Section 135 of Bombay Police Act. The Trial Court convicted the appellants for the offences punishable under Section 302 read with Section 34, Section 323 read with Section 34 of I.P.C. and Section 135 of Bombay Police Act and sentenced them to undergo imprisonment for life and to pay a fine of Rs.1,000/-, in default, to undergo further imprisonment for six months for the offence of murder and the Trial Court did not award any separate sentence for the other offences for which the appellants were convicted.

1.1 The incident in question occurred on 14th October, 1999 at about 8.30 p.m. at Rajiv Nagar area in Ahmedabad. As per the prosecution case, one Dharmendra Gokulbhai had married Daksha - daughter of appellant no.1 – Dahyabhai Kanabhai. This was not liked by Dahyabhai and there was tension prevailing between the families. Dharmendra had a friend named Gulsher Nasim Ahmed. He had also married a Hindu girl and they were staying in same area. On the day of incident, Gulsher and

Dharmendra came to the place of Gokulbhai on a scooter borrowed by them from a friend named Rajesh Desai. While they were parking the scooter, they were attacked by the present appellants who were armed with knives and iron pipes. In the attack, Gulsher sustained severe injuries and succumbed to it at a later point of time whereas Gokulbhai and his wife Nirmala also suffered injuries. On the incident occurring, Dharmendra fled away from the place whereas Gulsher, after suffering injuries, rushed to Hardasnagar police chowky (outpost) nearby and asked the police constable on duty to help him find an autorickshaw. The police constable helped him find out an autorickshaw, made him sit into it and sent him to Shardaben Hospital. Gulsher was dropped by the rickshawwala at the hospital where he was given treatment. Parallel to this, Gokulbhai also went to police and informed about the incident and then went to Civil Hospital. Gokulbhai's wife Nirmala went to Shardaben Hospital for treatment. History was recorded by the doctor in the case papers in respect of three injured persons. Police was then informed. Police came to the hospital and recorded the F.I.R. from Gulsher. Gulsher's cousin uncle Shamim came to the hospital, found that the deceased was not able to speak. So, he went back and came again to the hospital around 11.00 p.m. At that point of time, the deceased was in a better state of health as per the prosecution case and disclosed to

Shamim as to how the incident had occurred. The police wrote a yadi to the Executive Magistrate for recording dying declaration but before the Executive Magistrate could come and record the statement, the deceased succumbed to the injury. Since F.I.R. was already registered, investigation was made. The accused came to be arrested and while they were in custody, they are alleged to have discovered the weapons in presence of panch witnesses. The police, having found sufficient evidence, filed chargesheet against the three appellants in the court of Metropolitan Magistrate who, in turn, committed the case to the City Sessions Court and Sessions Case No.48 of 2000 came to be registered.

2. Charges were framed against the appellants at Exh.1 to which they pleaded not guilty and came to be tried. The City Sessions Court recorded the evidence led by the prosecution and ultimately came to the conclusion that the prosecution was able to establish charges against the appellants and recorded conviction, as stated hereinabove.

3. We have heard learned advocate Mr. Lakhani for the appellants and learned APP Ms. Patel for the respondent – State. We have examined the record and proceedings in light of the contentions raised before us by rival sides.

4. Learned advocate Mr. Lakhani submitted that the prosecution has examined as many as four eye-witnesses to the incident. Two of the witnesses have not supported the prosecution case and were declared hostile to the prosecution. However, Gokulbhai Nankabhai and Nirmalaben Gokulbhai - parents of Dharmendra have lent support to the prosecution.

4.1 Mr. Lakhani submitted that the Trial Court, in its judgment, has rejected almost the entire evidence of the prosecution except deposition of Nirmala. The court has concluded that Gokulbhai's deposition does not inspire any confidence at all. The other evidence in form of oral dying declaration before Shamimbhai is also not believed. So also, the recording of F.I.R. by Atabhai Jhala from deceased Gulsher is also not believed. Nirmalaben's evidence is, in no way, better than the evidence discarded and that is how, the Trial Court has committed an error in recording conviction on solitary evidence of Nirmalaben Gokulbhai.

4.2 Mr. Lakhani submitted that deceased Gulsher is alleged to have made an oral dying declaration before Shamim and is also alleged to have given F.I.R. before Atabhal Jhala, while he was under treatment at the hospital. However, there is evidence of doctors who

deposed in terms that when Gulsher was brought to the hospital, he was in a semi-conscious state, that his health went on deteriorating gradually till he died and that he was not able to speak and, therefore, the oral dying declaration before Shamimbhai and recording of F.I.R. becomes doubtful.

4.3 Gokulbhai has reported the incident to police by lodging a complaint for non-cognizable offence which is produced at Exh.60. In that N.C., names of assailants are not disclosed by Gokulbhai and he has described the assailants as unknown persons. Interestingly, in that N.C., Gokulbhai speaks of an assault on himself and his wife Nirmala but nothing about the assault on Gulsher. There is no reference to the present quarrel. The version of Gokulbhai, therefore, has to be examined keeping in light these facts.

4.3.1 Mr. Lakhani submitted that Gokulbhai was found to be drunk at the relevant time and came to be prosecuted therefor. It would be a question as to what extent his faculties may be functioning.

4.4 Deceased Gulsher had married a Hindu girl which was not welcomed by the society and, therefore, possibility of somebody else having assaulted Gulsher cannot be ruled out.

4.5 The medical certificate of Gulsher (Exh.53) refers to one Rajesh Desai as informer and the information given to the doctor is to the effect that the assault was by somebody. This Rajesh Desai has not been examined as a witness. There is no evidence on record to show who this Rajesh Desai is. All that comes on record is that deceased Gulsher and Dharmendra had borrowed a scooter from Rajesh Desai before the incident and on that scooter, they had gone to the place of incident whereafter the incident occurred. Beyond this, there is no evidence on record. There is nothing to indicate why and when did Rajesh Desai come to the hospital and when did he leave the hospital. The evidence shows that Rajesh Desai is not the person who took the deceased to the hospital. It was some rickshawwala who took the deceased to the hospital.

4.6 As per the prosecution case, Dharmendra was present when the incident occurred and then he fled away but for the reasons best known to the prosecution, the prosecution has not examined Dharmendra as a witness. It was contended by learned advocate Mr. Lakhani that conduct of the appellants, if seen, would reflect that it is consistent with innocence of the appellants. None of the appellants has tried to flee. They are arrested immediately. They were on police remand and there is no

disclosure by them in respect of the incident despite a thorough interrogation. Mr. Lakhani submitted that none of the clothes of any of the accused carried any blood marks. Even the weapons allegedly discovered by them do not carry any blood stains.

4.7 Mr. Lakhani submitted that evidence of Gokulbhai and Nirmalaben has to be examined keeping in light the fact that when they went to the hospital for treatment, the history that they gave to the doctor was that all injuries are caused by the opposite party with brickbats and stick but do not give name of the assailants as the accused – appellants.

4.8 It is also contended that as per the prosecution case, Nirmalaben was sent to the hospital with a police yadi. No such police yadi is produced on record. On the contrary, say of Nirmalaben is that she went to the hospital in search of Gulsher.

4.9 It was contended by learned advocate Mr. Lakhani that the appellants' grievance, if any, was against Dharmendra as per the prosecution case. No explanation is tendered by the prosecution to explain as to why the appellants should attack Gulsher though Dharmendra was available at the spot. No motive is indicated for attacking Gulsher.

4.10 Mr. Lakhani submitted that evidence of Shamimbhai indicates that the oral dying declaration made before him by the deceased disclosed name of appellant no.2 – Jayeshkumar Manilal. This was made at 11.00 p.m. on the day of incident as per the prosecution case. However, in the F.I.R. which is recorded by police at a later point of time, the deceased has not given name of appellant no.2 but has described him as eldest son of Manilal and has categorically stated that he does not know the name. Mr. Lakhani submitted that the investigation does not seem to have been carried out in the manner in which it is projected to have been done. Mr. Lakhani submitted that the investigation is carried out in a very casual manner. To substantiate this contention, Mr. Lakhani has pointed out to us that statement of Rajesh Desai is not recorded and panchnama of autorickshaw in which the deceased was carried to the hospital is not drawn. There is no evidence, even attempted to be collected, as to what happened to the scooter on which the deceased and Dharmendra had gone to the spot. The P.S.I. who went to Shardaben Hospital namely, P.S.I. Paan Patil did not take any effective steps in the matter on learning that the incident had occurred within the jurisdiction of Rakhial Police Station. This officer could have ascertained as to how the incident occurred and could have even recorded the

F.I.R. or the statement of the deceased if he was conscious and in good state of health. He could have even arranged for recording of dying declaration by an Executive Magistrate.

4.11 The conduct of the witnesses also calls for consideration. Gokulbhai Nankabhai - father of Dharmendra states that at the time of the incident, Dharmendra was not present at all whereas other witnesses' version was that he was present and then he fled away. Witness Rakeshsinh Rajbahadursinh, who is in charge of Hardasnagar Police Chowky, on being approached by the deceased in an injured condition takes no steps or tries to know how the incident occurred, how the deceased sustained injury etc. He, instead of taking him to Bapunagar Government Hospital, located next door to the police chowky, asks the deceased to go to Shardaben Hospital by instructing an autorickshaw to take the deceased to that hospital. As if this is not enough, the said witness – Constable Rakeshsinh takes no steps thereafter of informing higher officers. It is only when P.I. comes to the chowky at about 11.40 p.m. that he informs the P.I. It has come in evidence of the doctor that in case of such injury, there would be profused bleeding. It is the case of the prosecution that the deceased started running and approached Hardasnagar Police Chowky and requested the police constable in

charge to help him get an autorickshaw which the police constable did. But no steps are taken to verify if there was any blood at the police chowky or on the way. Even while the deceased was taken to the hospital in an autorickshaw, the police constable at Hardasnagar Police Chowky does not record the number of the autorickshaw and no panchnama of that autorickshaw is drawn as to whether there were any blood stains in the autorickshaw or not. The statement of the autorickshaw driver is recorded but he is not examined as a witness.

4.12 Mr. Lakhani submitted that all these factors taken collectively would indicate that the investigation has not been properly carried out nor is the prosecution done properly. The witnesses' version are inconsistent and contradictory to each other. The conduct of the accused persons is consistent with their innocence. No motive is established and material witnesses have not been examined. All these factors collectively render the prosecution case susceptible to reasonable doubt. The Trial Court, therefore, has refused to believe the evidence of other witnesses but has erred in accepting the evidence of Nirmalaben which also suffers from the same defects as evidence of her husband Gokulbhai and, therefore, the appeal may be allowed and conviction may be set aside.

5. The appeal is opposed to by learned APP Ms. Patel. According to her, the Trial Court has taken into consideration all relevant aspects but has committed an error in appreciating the evidence of Shamimbhai, Atabhai, Gokulbhai etc. If the court found evidence of Nirmalaben reliable, there is no further defect in the evidence of Gokulbhai and that ought to have been accepted by the Trial Court. She submitted that the discrepancies which are highlighted by learned advocate Mr. Lakhani are, in fact, minor discrepancies and do not have any bearing on trustworthiness or truthfulness of the prosecution case. The complexion of the case remains the same. The discrepancies are only minor and cosmetic and deserve to be ignored. She, therefore, submitted that there is no substance in the appeal and the appeal may be dismissed.

6. We have examined the record and proceedings in light of the contentions raised before us by rival sides. We find from the evidence that the prosecution has examined, in all, four eye-witnesses

(1)Ramilaben D. Parmar (Exh.12)

(2)Chandrikaben A. Chamar (Exh.13)

(3)Gokulbhai Nankabhai (Exh.14) and

(4)Nirmalaben Gokulbhai (Exh.18)

Out of these four eye-witnesses, Ramilaben Parmar and

Chandrikaben Chamar have not supported the prosecution case and have been declared hostile to the prosecution.

6.1 So far as evidence of Gokulbhai is concerned, he is the father of Dharmendra. He says that the daughter of appellant no.1 – Dahyabhai had eloped with Dharmendra – his son and then they had entered into a wedlock at Ajmer. According to this witness, P.I. Damor had asked him to produce Daksha and Dharmendra and had threatened that if he does not do so, his life would become difficult. He, therefore, brought Dharmendra and Daksha from Ajmer. Daksha told police that she had actually eloped with Dharmendra and ultimately, the police released Dharmendra and sent Daksha to Nari Samrakshan Gruh and thereafter, they could procure Daksha after following due procedure. Regarding the incident, he says that it occurred at around 8.25 p.m. on 14th. Gulsher had gone to see him and he inquired as to where is Dharmendra and he told him that he had gone to a relative's house. Gulsher had a cup of tea with him and then left. When he got down from the house, Dahyabhai and Jayesh assaulted him with knives. There was a crowd of about 20-25 persons who had assembled. Blows were given to Gulsher on chest, abdomen etc. with knives indiscriminately. Gulsher, therefore, fell down. He says that he saw all this from the balcony. The witness says that he and his wife, therefore, got down immediately when Nirmala was

attacked by Manilal – accused no.3 with a pipe. She, therefore, fell down. According to him, Jayesh gave him knife blow on left hand as a result, he also fell down and thereafter was assaulted upon with a pipe by Manilal. Then Nirmala was attacked by Manilal with a brick on her eye. His wife was sent to Shardaben Hospital for treatment. The quarrel was on and at that time, P.I. Damor came. He sent the witness's wife to Shardaben Hospital for treatment. The witness says that he was drunk at that time and he was sent to Civil Hospital for treatment whereas Gulsher was sent to Shardaben Hospital for treatment where he died around 5.30 in the morning. The witness says that his clothes were blood-stained. He identifies Muddamal article , so also the accused.

6.1.1 The witness has been cross-examined. He states that he was aware about the affair between Dharmendra and Daksha. Father of Daksha also knew about it. Dahyabhai – appellant no.1 had not lodged any F.I.R. either against Dharmendra or the witness before the elopement. He admits, during cross-examination, that he had not stated before police that when Gulsher came to his house and inquired about Dharmendra, he told him that Dharmendra had gone to his sister's house. He also admits that he had not stated before police about presence of 20-25 persons. According to him, he had stated before police that Jayesh had inflicted knife blow

on left hand. He admits that before Damor lodged F.I.R. against him for the offence under Prohibition Act, he had lodged F.I.R. in respect of the present incident before Damor. That F.I.R. was given by him at 10.30 p.m. on 14th itself and the P.I. had drawn a panchnama of the place of incident and thereafter had recorded the F.I.R. He denies that in his N.C. Complaint, he has not disclosed name of the assailants.

6.2 If evidence of 2nd supporting eye-witness – Nirmalaben Gokulbhai is seen, she says that the incident occurred on 14th. At that time, her husband was present in the house. Around 8.15, her son Dharmendra and deceased Gullu (Gulsher) came to their house. All three accused persons were quarreling with her son and deceased Gullu. On noticing this, she inquired of them why they were quarreling. The accused persons were giving abuses. Accused Dahyabhai (appellant no.1) and accused Jayesh (appellant no.2) had knives in their hands whereas Manilal (appellant no.3) had a pipe in his hand. Jayesh caught hold of Gullu and both inflicted knife blows on him. The witness says that she intervened. At that time, appellant no.3 inflicted a pipe blow on her head. Appellant no.3 also caused injury to her left eye with brick. She says that because her son was injured, she went to Shardaben Hospital in search of her son. There she was given treatment and discharged. Gulsher was at

Shardaben Hospital under treatment and had sustained injuries on abdomen, chest and left hand with knife. He expired in early morning hours of 15th. She had not talked with the deceased. She identifies the Muddamal article. She says that she has shown the place of incident to the police. During cross-examination, she pleads ignorance on question as to whether her husband was drunk at the time of the incident. She heard the hubbub for about 5-7 minutes and then she saw the occurrence for about 5-7 minutes while standing in the balcony alongwith her husband. There was an altercation then. 10-15 persons had assembled. 10-15 persons more also came whom she does not know. She asserts that her son was present at the time of the incident and it was not a situation that deceased Gulsher was all alone. The incident lasted for about 10-15 minutes. There is a tubelight near the place of incident. During cross-examination, she says that she had told the doctor that she was assaulted with a pipe. She asserts that she had not told the doctor that she was assaulted with a stick nor did she tell the doctor that she was assaulted with a brick. At the hospital, Gullu's relatives had come to see him and he was talking with all of them. She, however, did not have any talk with him at the hospital. She says that her clothes were blood-stained but she had washed the clothes because she had no other clothes to wear.

7. What emerges from the evidence of these two eye-witnesses is an inconsistent and unreliable version about the incident. According to Gokulbhai, Dharmendra was not present at the time of incident and when deceased Gulsher came to him and inquired about Dharmendra, the witness told the deceased that Dharmendra had gone to his sister's place. Thereafter, they had a cup of tea together and when deceased Gulsher left the house, he was attacked by the appellants. Against this, the version that is given by Nirmalaben is that Dharmendra was very much present at the time of incident. She does not say that Gulsher came home, had a cup of tea and when he went out, the incident occurred. According to her, while she was home, she heard some hubbub. She heard that hubbub for 10-15 minutes and then went into the balcony to notice that an altercation was going on between the appellants and the deceased. She watched the altercation from balcony alongwith her husband and asked as to why they are quarreling. We are, therefore, getting two different versions from so-called eye-witnesses on genesis of the incident. However, consistently in their depositions, both the witnesses tried to implicate the appellants.

7.1 If the prosecution evidence, as a whole, is seen, we find that both these injured eye-witnesses, when

they are taken to the hospital, they do not give name of the assailants as the accused or the appellants. On the contrary, they say that they were assaulted upon by unknown persons. It is not the case of the prosecution that these witnesses did not know the appellants prior to the incident. The prosecution case, on the contrary, is otherwise because the witnesses happen to be parents of Dharmendra who had married daughter of appellant no.1 – Dahyabhai. There was a litigation for custody of Daksha – Dharmendra's wife and, therefore, both the sides knew each other well. If the attack was made by the appellants, there was no scope for the witnesses not to identify the appellants because the incident occurred under a tubelight and the incident was seen, as claimed by the witnesses, from a short distance. If that is so, why the witnesses should have stated to the doctor that they were assaulted upon by unknown persons? The matter does not stop here. Nirmalaben goes even to the extent of saying that she was assaulted upon by brickbats by unknown persons. This renders the deposition of these two witnesses susceptible to doubt about their veracity.

7.2 It has come in evidence of Gokulbhai that P.I. Damor had come to the spot at the time of the incident and he (Gokulbhai) had lodged an F.I.R. with P.I. Damor which he had written down. If this is correct, we fail to understand where that F.I.R. is because no such F.I.R.

is produced by the prosecution. Differently looked, if there is no such F.I.R. recorded by P.I. Damor, then witness Gokulbhai has fabricated a story. We may not forget that Gokulbhai was drunk at the time of the incident and came to be prosecuted therefor. The fact remains that at the time of the incident, if Gokulbhai had given F.I.R., that F.I.R. is not coming on record and if that F.I.R. is not given by Gokulbhai then Gokulbhai is not telling the whole truth to the court.

7.3 After the incident, it is the prosecution case that deceased Gulsher started running and went to Hardasnagar Police Chowky where he came across witness Rakeshsinh Rajbahadursinh (Exh.28) and asked for getting a rickshaw for him. This police witness, instead of inquiring as to what had happened and instead of taking him to the hospital for treatment, strangely gets an autorickshaw for him and asks the rickshaw driver to take him to Shardaben Hospital which is at a distance. Bapunagar General Hospital is located just next to that police chowky which is also a relevant factor which has come on record. The witness, therefore, strangely, instead of taking this injured Gulsher to nearest available hospital, instead of inquiring about how he sustained injury, when and where (which is a normal thing to expect from a police personnel), as an obedient person, gets an autorickshaw and sends the man to

Shardaben Hospital.

7.4 When deceased Gulsher goes to the hospital, it has come in evidence of doctors that he was brought by an autorickshaw driver and the rickshaw driver then went away. Strangely, some Rajesh Desai is present at the hospital who gives history about the assault by somebody. Who this Rajesh Desai is has not come on record at all. No explanation has come as to why his statement has not been recorded and why was he not examined as a witness.

7.4 Now comes a situation to examine what was the status of health of the deceased at the hospital. It has come in evidence of doctors that when deceased Gulsher came to the hospital, he was semi-conscious. Exh.53 certificate indicates that when the deceased was brought to the hospital at 9.40 p.m., he was semi-conscious. The B.P. was less and he was dyspnoeic. On examination, it was found that pulse was not palpable, blood pressure was not recordable. Dr. Mehul Acharya (Exh.52) has, in terms, stated in his examination-in-chief that the mental condition of the patient (Gulsher) was not good and he was not able to speak properly. During cross-examination, it has come that the medical cases papers indicated that the deceased was conscious at 11.00 p.m., was conscious at 12.00 midnight, was semi-conscious at 1.00 a.m., again semi-conscious at 1.30 a.m. and was

conscious at 2.15 a.m. but there is a change made in the endorsement by scoring out word 'semi' out of word 'semi-conscious' converting the word 'semi-conscious' into the word 'conscious'. It has also come in evidence of the doctor that the condition of the patient was gradually deteriorating. It improved for a while when some treatment was given. We have examined the medical case papers and we find that the patient was under a constant watch of doctors and consistent endorsements were made in the case papers. When he was brought, he was semi-conscious, at 10 o'clock also, he was found to be semi-conscious, at 10.20 again he was semi-conscious, at 10.30 also, he was semi-conscious, at 10.50, he was semi-conscious, at 10.55 he was semi-conscious, at 11.10 he was found to be conscious, at 12 o'clock also he was found to be conscious, at 1.00 a.m. he was semi-conscious, at 1.30 a.m. also he was semi-conscious, at 2.00 a.m. he was again found to be semi-conscious and at 2.50 a.m. there is an endorsement that the patient was semi-conscious and then out of that endorsement the word 'semi' is scored out. Again at 3.00 a.m., it was found that the patient was semi-conscious. Thereafter all endorsements indicate that he was semi-conscious and ultimately, he expired on his general condition deteriorating.

7.5 Significantly, recording of F.I.R. is claimed to

have started between 1.30 to 1.35 a.m. and it lasted till 2.15 a.m. According to P.S.I. Atabhai Jhala, the patient was conscious. However, he has not obtained any endorsement from the doctor. Now, if we see the medical case papers, we find that at 1.30 a.m., the deceased was in semi-conscious state of health and even at 2.00 a.m., he was semi-conscious. The scored out endorsement was made only at 2.15 a.m. when, according to P.S.I. Jhala, the recording was over. Therefore, the F.I.R. which is recorded, even as per the prosecution case, was during the time when as per the medical case papers, the deceased was in semi-conscious state of mind. We find an endorsement in the medical case papers that the patient was found to be not well-oriented for time, place and persons. This endorsement was made on arrival and even at a later point of time.

8. With the above medical evidence on record, it is difficult for us to accept that the deceased gave the F.I.R. as recorded by P.S.I. Jhala. So also, it is difficult for us to accept the say of Shamimbhai that the deceased gave an oral dying declaration implicating the appellants at about 11.00 p.m. The medical evidence in form of case papers maintained regularly as can be seen in ordinary course of the business indicates that the deceased was in a semi-conscious state of health around 11.00 p.m. The condition at 10.55 p.m. indicates that

the patient was semi-conscious, at 11.10 p.m. it indicates that the patient was semi-conscious, at 11.20 p.m. the condition was the same and at 11.30 the condition remaining the same, Dr. Trivedi was informed and at 12.00 midnight again, the condition was found to be same. As such, in absence of any other supportive corroborative evidence, it is difficult to accept evidence of Shamim. If his conduct is seen, Shamim goes to the hospital, finds Gulsher in the hospital in a critical condition, does nothing, goes back and comes again at 11.00 p.m. when he claims that the deceased made an oral dying declaration. In our opinion, the Trial Court was fully justified in not relying on either the oral dying declaration or the F.I.R. or evidence of Gokulbhai.

8.1 It is also interesting to note that in the oral dying declaration, it is claimed that the deceased gave name of Jayesh. Though oral dying declaration is claimed to have been made at 11.00 p.m. on 14th October, 1999 but in a subsequent F.I.R. recorded at 1.30 a.m. on 15th October, 1999, the deceased refers to Jayesh as the eldest son of Manilal whose name he does not know. It is true that Jayesh is the eldest son of Manilal but that would not establish the truthfulness of the evidence. If a person knew appellant no.2 by name at 11.00 p.m., he would not have referred to him 2½ hours thereafter as

eldest son of Manilal. This, by itself, cannot be a factor for discarding the evidence of the prosecution but the prosecution case suffers from a number of other inconsistencies, discrepancies and defects.

9. The deceased went to the hospital in an autorickshaw. Statement of that autorickshaw driver is recorded but panchnama of autorickshaw is not drawn nor the autorickshaw driver is examined as a witness. We, therefore, do not have any material to know whether there were any blood stains in the autorickshaw or not and if there were blood marks, whether they belong to the group of the deceased or not.

9.1 It appears that P.S.I. Jhala sent a yadi to the Executive Magistrate (Exh.46) for recording dying declaration. The said yadi seems to have reached the Executive Magistrate at 3.10 a.m. and when he went to the hospital at 3.45 a.m., the deceased had already expired. According to P.S.I. Jhala (Exh.38), the said yadi was written by him to the Executive Magistrate after recording the F.I.R. whereas in the yadi, there is no reference to the name of the assailants. What is referred to is only opposite party.

9.2 Evidence of Atabhai Jhala (Exh.38), who is the Investigating Officer, is also very interesting to note.

According to him, he went to the hospital and found that Gulsher was conscious and, therefore, he recorded the F.I.R.. Then he arranged for recording of dying declaration. He says that he was at the hospital from 1.25 a.m. till the deceased expired. On death of the deceased and on post-mortem being performed, the clothes of the deceased were seized by him in presence of panch witnesses. According to him, the F.I.R. was written down by his writer Dhanesh so also the panchnama. The F.I.R. Is at Exh.39 and the panchnama is at Exh.33. P.S.I. Jhala insisted that they are both written by his writer Dhanesh at the same time. When his attention was drawn during cross-examination that both these documents are written by two different hands with two different pens, he denies that and insists that their writings are not different. The learned Judge has also found that the writings are different and we also agree with him after examining the documents at Exh.33 and Exh.39. With bare eye and without any expertise, one can notice that both these documents are written with two different pens and the handwritings are totally different. We do not know what has prompted the Investigating Officer to persistently insist that they are written by same person. Significantly, Dhanesh is not examined. The effect of this situation is that the Investigating Officer has a tendency not to tell the truth before the court even while he is deposing on oath and he has the audacity of

insisting for something which is contrary to record. This character of the Investigating Officer has to be borne in mind while assessing the reliability or veracity of the investigation and in our opinion, no reliance can be placed on such investigation for recording a conviction for serious offence like murder.

10. It has come in evidence of Medical Officer that if more than one blows are given by same knife, the knife would carry blood marks. Now in the instant case, post-mortem notes indicate that the deceased had multiple injuries which could have been caused with a knife. As per the prosecution case, there were two knives. So at least one of the knives must have been used repeatedly. Then such a knife should carry some blood marks which is found to be absent. Apart from that, the knives are discovered from an open place accessible to anyone by a joint discovery panchnama by appellant no.2 and appellant no.3 which is at Exh.23. The panch witnesses have not supported the prosecution case and we refuse to rely on the evidence of the Investigating Officer in light of the above discussion. As regards the motive also, it may be stated that the accused, if they were the assailants, had grievance, if any, against Dharmendra and when Dharmendra was very much available, they had no reason to commit an assault on deceased Gulsher. It is nobody's case that there was any fight or scuffle and in that scuffle or

fight, Gulsher sustained injury. As per the evidence, the assault was committed straight on Gulsher and for that, no motive is proved. The evidence of eye-witnesses does not inspire any confidence and absence of motive, therefore, would assume significance.

11. Interestingly, Dharmendra is not examined as witness though projected as eye-witness and no explanation therefor is given by prosecution.

12. The sum and substance of the prosecution case is that the evidence on genesis of the incident is inconsistent and unreliable. The evidence on actual occurrence is also inconsistent and unreliable. The evidence of what happened after the incident is also inconsistent and unreliable. The investigating agency has acted in a casual and careless manner, if not dishonest. The evidence of Nirmalaben suffers from the defects from which evidence of Gokulbhai also suffers and there is no reason to take a different view in respect of evidence of Nirmalaben and place reliance on her evidence. With the prosecution case suffering from a large number of defects discussed hereinabove, it is risky to rely on evidence of Nirmalaben Gokulbhai and confirm the conviction recorded by the Trial Court. The appeal, therefore, merits acceptance.

13. The appeal is allowed. The judgment and order dated 29th June, 2000 rendered by learned Additional Sessions Judge, Court No.19, Ahmedabad in Sessions Case No.48 of 2000 is hereby set aside. The appellants are acquitted of the charges for which they came to be convicted by the Trial Court. Appellant no.2 be set at liberty forthwith, if not required in any other case.

14. We notice that appellant no.1 and 3 had been released on bail by virtue of an order passed on 10th August, 2000 by this court. Under the circumstances, bail bond in respect of appellant no.1 and 3 shall stand cancelled.

(A.L. Dave, J.)

(Sharad D. Dave, J.)

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